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A. R. Caylor

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-189641

DATE: October 21, 1977

MATTER OF: Boyd Lumber Corporation

DIGEST:

Premature opening of protester's bid for purchase of Federal timber, while improper and unfortunate, does not warrant rejection of all bids and readvertising, since protester was afforded opportunity to protest to Comptroller General, or revise or confirm bid prior to official bid opening, three higher bids considered at formal opening were not based on protester's bid, and readvertising would give protester opportunity to compete for award to prejudice of high bidder in light of disclosed prices.

Boyd Lumber Corporation (Boyd) protests the failure of the Forest Service, Department of Agriculture, to reject all bids and readvertise a Strike Timber Sale after Boyd's sealed bid was inadvertently opened by Forest Service employees prior to the time specified for bid opening--July 13, 1977. On July 11, 1977, a Forest Service mailclerk opened the sealed bid envelope that had been received from Boyd on that date. When it was subsequently determined that the envelope contained a bid, a member of the Budget and Finance Staff replaced the bid papers in the envelope, resealed it and reported the error to the Timber Staff Officer. The three employees who handled the opened bid envelope signed statements denying any knowledge of figures in the bid.

On July 12, 1977, the Timber Staff Officer notified the Boyd comptroller by telephone of the inadvertent opening. The circumstances were fully explained and Boyd was offered three alternatives: protest any subsequent sale to our Office or confirm or revise the bid. If Boyd chose to revise its bid a new bid opening date would be set to allow a reasonable time for preparation of the revised bid. Because an officer of Boyd with authority to select from among the available alternatives was apparently not available, the Forest Service offered to delay the bid opening until the president was available to act. When finally contacted at the initiative of the Forest Service 1 hour prior to the scheduled bid opening, the president declined to select from among the offered alternatives and advised the Forest Service to proceed in what it felt was a "right and proper" manner.

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According to the Forest Service, because of this "non-committal" response, the Forest Service informed him it would use the original bid and would open the bids as scheduled. This was accomplished and award has been withheld pending our decision.

Boyd subsequently protested this action to our Office on the ground that the premature opening of its bid violated section 14(e) of the National Forest Management Act of 1976, Pub. L. 94-588, 90 Stat. 2959 (October 22, 1976), 16 U.S.C.A. § 472a(e)(2), requiring the sale of Federal timber by sealed bidding, and asserts that the Forest Service should therefore reject all bids and readvertise the sale. Boyd complains that the Forest Service has not met its burden of demonstrating that no harm resulted from the premature bid opening, that Mr. Boyd had sufficient time to choose from among the offered alternatives and that the alternatives offered were reasonable.

By letter dated August 24, 1977, the Forest Service recommended that, "In view of the alternatives offered Boyd Lumber Company * * * prior to the scheduled bid opening * * * their bid protest be denied."

While the action of the Forest Service employees in opening and handling the bid prior to the time scheduled for opening was improper and unfortunate, under the reported facts and circumstances, we find no proper legal basis for requiring the rejection of all bids. It appears that only Boyd's president had authority to select one of the offered alternatives and that he could not be reached until 1 hour prior to the scheduled bid opening. The record shows, however, that on the evening of July 12, the Boyd comptroller had briefed the president on the situation and had told him of the alternatives offered by the Forest Service. Thus, it is apparent that the president had considerably more than 1 hour to determine a course of action.

Boyd cites our decision at 34 Comp. Gen. 395 (1955) in support of its position. In that decision and two others, B-161638, June 21, 1967; B-149878, November 20, 1962, we supported the various agency findings that the protesters had suffered no harm by looking to the facts and circumstances surrounding the premature openings of individual or multiple bids. The facts and circumstances of the present case are almost identical to those cases, especially B-149878, *supra*, where an opportunity to confirm or revise a prematurely opened bid was given; therefore, for the following reasons, we conclude that Boyd was not prejudiced by the premature opening of its bid.

The offer to permit bid confirmation or to delay the scheduled bid opening to permit revision of Boyd's bid or to permit the firm to protest the premature opening to our Office would have permitted Boyd to overcome any harm it might have suffered as the result of the early opening. Further, there is no evidence of record concerning a leak of the Boyd price. Of particular significance, in view of the \$363,118 price differential between the highest bid and the bid of the protester and because the next high bid is more than \$47,000 higher than that submitted by Boyd, it may be reasonably concluded that these higher bids were not based on the figure submitted by the protester but, rather, were independently prepared. It is clear that Boyd would have been in the same relative position as it would have been had the error in the opening of bids not occurred. Under these circumstances, the rejection of all bids and readvertising of the sale would prejudice the higher bidder by allowing Boyd another opportunity, by reason of the Government's fortuitous error, to compete for the award in the light of now disclosed higher prices. Protection of the integrity of the competitive bidding system discourages, rather than favors, such a result. See all decisions cited above.

Boyd's protest is denied.

for *Milton J. Fowler*
Comptroller General
of the United States